TRACTORS (M) BHD.

v.

SOUTHERN ESTATES SDN. BHD. & ANOR.

FEDERAL COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 146 OF 1982]
23 DECEMBER 1983

CIVIL PROCEDURE: *Application to strike out statement of claim - Res judicata - Lapse of time.*

CIVIL PROCEDURE: *Appeal - Whether properly brought before Court - Notice of appeal - Whether filed out of time - Whether extension of time should be allowed.*

The appellants obtained under O. 14 RSC 1957, a summary judgment against the 1st respondent and a consent judgment against the 2nd respondent in 1969. In 1972 the 2nd respondent filed a claim to set aside the consent judgment. The Privy Council dismissed the claim. In 1978 both respondents brought the suit before the Court to set aside the summary and the consent judgments on ground of fraud which they alleged was discovered only in 1977. The appellants took out summons-in-chambers to strike out the respondents' statement of claim on pleas of *res judicata* and delay. The application was dismissed by B.T.H Lee J on 20 January 1979. The appellants appealed. The appellants filed notice of appeal on 28 May 1982, having obtained leave under s. 68(2) of the Courts of Judicature Act 1964 (revised 1972) ("the Act") from Wan Mohamed J on 17 May 1982 to appeal to the Federal Court. Notice of motion for leave to extend time was filed on 15 July 1982.

Held:

[1] The fact that the order of 20 January 1979, was made by B.T.H. Lee J did not prevent Wan Mohamed J from granting leave to appeal. The words "a Judge of the High Court" under s. 68(2) of the Act means any Judge of the High Court of competent jurisdiction.

[2] On the facts of the case, time for appeal ran from the date when the order in chambers was pronounced and not from the date leave was obtained. In the absence of a certificate, time for appeal starts to run from the date when such order was pronounced at the hearing, as provided by r. 56 (a) of the Rules of the Federal Court, 1980.

[3] The notice of appeal was filed well out of time. Notwithstanding compliance with s. 68(2) of the Act, the appellants had failed to comply with r. 56(a) of the above rules. An appeal against an order in chambers to the Federal Court is not properly brought unless first, the case is applicable under s. 68 of the Act and secondly, the notice of appeal has been filed within the time prescribed by r. 56(a) of the above Rules. There is no conflict between s. 68(2) of the Act and r. 56(a) of the above Rules

[4] As there were no special grounds shown for the Court to exercise its discretion under r. 56 (a) of the above rules, the case was not a proper case in which extension for time to file notice of appeal should be allowed, even if the Court were to proceed and the assumption

that the motion for leave had not been abandoned. Mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time. *(Sri Jaya Transport Co. Ltd v. Fernandez* [1970] 1 MLJ 87,88,89)

[Appeal and notice of motion to amend record of appeal dismissed.]

Cases also referred to:
Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
Bank of America National Trust and Savings Association v. Chai Yen [1980] 1 MLJ 198
Sri Jaya Transport Co. Ltd. v. Fernandez [1970] 1 MCJ 87
Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129
Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn. Bhd. [1979] 2 MLJ 236

Legislation referred to:
Courts of Judicature Act 1964, ss. 4, 17, 68(2)
Rules of the High Court 1980, O. 32 r. 11
Rules of the Federal Court 1980, r. 56(a)
Rules of the Supreme Court 1957, O. 14, O. 54, r. 22A

For the appellants - C. Abraham; M/s. Jayasuriya Kah & Co.
For the respondents - R.R. Sethu; M/s. Solibun & Golokin

JUDGMENT

Mohd. Azmi FJ:

The dispute in this appeal arose out of nineteen agreements dated 1 October 1967, under which the appellants had allegedly sold under hire purchase 19 caterpillar logging equipment to the first respondent company on the guarantee of the second respondent. In Civil Suit No. 189 of 1969, the appellants obtained under O. 14 RSC 1957 summary judgment against the first respondent for the sum of RM959,896.92 on 27 December 1969, and on the same date they also obtained a consent judgment for the amount of RM718,266.85 against the second respondent vide Civil Suit No. 190 of 1969. By Civil Suit No. 199 of 1972, the second respondent filed a claim to set aside the consent judgment in Civil Suit No. 190 of 1969. On appeal to the Privy Council, the appellants succeeded in restoring a High Court order of dismissal of respondents' claim - see *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1. Both respondents then brought the present suit (Civil Suit No. 190 of 1978) to set aside the summary judgment in Civil Suit No. 189 of 1969 and as well as the consent judgment in Civil Suit No. 190 of 1969 on ground of fraud which they alleged was only discovered in June 1977. It is their case that between October 1967 and June 1977, fraud had been practised against them in that they were misled in believing that the 19 agreements were hire purchase agreements when in fact they were only hire agreements. The appellants took out summons-in-chambers dated 24 April 1978 to strike out the respondents' statement of claim on a plea of *res judicata* and on the ground that both the summary and consent judgments of 1969 could not be set aside for fraud allegedly discovered after a lapse of about 11 years. B.T.H. Lee J found for the respondents and dismissed the appellants' application on 20 January 1979. Hence the present appeal by the appellants against the dismissal of their summons-in-chambers.

At the outset of this appeal however, our attention was drawn by Mr. Sethu, Counsel for the respondents, to the appellants' notice of motion filed on 15 July 1982 in which the appellants had applied for an order that they be given leave to bring their appeal pursuant to the provisions of r. 56 of the Rules of the Federal Court 1980 by having the time for the filing of the notice of appeal extended. In reply, Counsel for the appellants, Mr. Abraham,

intimated to us that the application for leave of this Court was in fact and in law unnecessary, as the appellants had obtained leave under s. 68(2) of the Courts of Judicature Act 1964 (revised 1972) from Wan Mohamed J On 17 May 1982 to appeal to the Federal Court (see p. 105). Since notice of appeal was filed on 28 May 1982 (p. 106), r. 56 of the Rules of the Federal Court had been complied with because, according to Mr. Abraham, the time limit for appeal which is one month, would commence from the date of obtaining leave, and as such the present appeal had been properly brought before this Court. Mr. Sethu however argued that notice of appeal must be filed within one month of 20 January 1979 - the date of B.T.H. Lee's order and not of 17 May 1982 - the date of procuring leave from Wan Mohamed J. He further contended that even if the appellants' notice of motion were proceeded with, the application for leave to appeal out of time could not succeed, as the ground relied upon in the affidavit in support of the application was based on a mistake of law by the appellants' solicitors.

From the submissions of Counsel for both parties, it is clear that what we have to determine is whether the present appeal has been properly brought before us. On the necessity of the appellants' notice of motion for extension of time, it is essential to consider the provisions of s. 68(2) of the Courts of Judicature Act, r. 56(a) of the Rules of the Federal Court and also O. 54 r. 22A of the repealed Rules of the Supreme Court 1957 which though in force on the date of B.T.H. Lee's order in 1979 was no longer so when notice of appeal was filed in 1982. Section 68(2) of the Act as amended with effect from 23 February 1982 by Act A530 provides:

> No appeal shall lie from an order made by a Judge of the High Court in chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court.

Whereas r. 56(a) Rules of the Federal Court which was amended in August 1980 by P.U. (A) 222 as a result, we believe, of Privy Council decision in *Bank of America National Trust and Savings Association v. Chai Yen* [1980] 1 MLJ 198 provides:

> No appeal shall, except by leave of the full Court, be brought after the expiration of one month -
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> (a) in the case of an appeal from an order in chambers, from the date when such order was pronounced at the hearing or after the hearing in open Court or after the issue of the certificate by the Judge that he requires no further argument, **whichever is the later** or when the appellant first had notice thereof (the emphasis is ours).

Order 54 r. 22A RSC 1957 (now omitted in O. 32 r. 11 Rules of the High Court 1980) provides as follows:

> Any party dissatisfied with any order made by a Judge in chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument; and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument he may set aside the order previously made and make such other order as he thinks fit.

If there is a conflict between s. 68(2) of the Courts of Judicature Act which came into force on 16 March 1964 and O. 54 r. 22A RSC 1957, then by virtue of s. 4 of the Act, the provision of s. 68(2) shall prevail. By the same token, it cannot however be argued that if there is a

conflict between s. 68(2) and r. 56(a) of the Rules of the Federal Court which was made under s. 17 of the Act, the statutory provision cannot prevail over the rule merely because the rule as amended was made subsequent to the Act. But in truth there is no conflict at all between s. 68(2) and r. 56(a). Section 68(2) deals with non appealable matters whereas r. 56 governs the time limit for filing notice of appeal. An appeal against an order in chambers to the Federal Court is not properly brought unless firstly the case is appealable under s. 68 and secondly the notice of appeal has been filed within the time prescribed by r. 56(a). The order is only appealable if the aggrieved party has fulfilled one of the conditions imposed by s. 68(2). In the instant case, there is no dispute that the order appealed against is an order made by a Judge of the High Court in Chambers on 20 January 1979. The net result of the two provisions is that in the absence of a certificate, time for appeal starts to run from the date when such order was pronounced at the hearing. Although under s. 68(2) an aggrieved party has three options i.e. either comply with the fourday rule and apply for a certificate from the Judge who made the order, or apply for leave from the Federal Court or from a Judge of the High Court, he must face the different consequences imposed by r. 56(a) as to when the one-month period of appeal would commence. The words "whichever is the later" in r. 56(a) seem to suggest that the safest procedure for an appellant would be to comply with the four-day rule and apply for a certificate unless the appellant can rush through within one month from the date when such order was pronounced not only the process of obtaining leave but also the filing of the notice of appeal. As regards the third option, we find no substance in Mr. Sethu's submission that the words "from a Judge of the High Court" should be interpreted as meaning the same Judge who made the order appealed against. We rule that "a Judge of the High Court" under s. 68(2) means any Judge of the High Court of competent jurisdiction. As such the fact that the order in chambers was made by B.T.H. Lee J does not prevent Wan Mohamed J or any other High Court Judge from granting the leave. But for reasons already stated, what is fatal in this case is the failure of the appellants to comply with r. 56(a) in not filing their notice of appeal within the time prescribed by the rule. On the facts of the present case, time for appeal would run from the date when the order in Chambers was pronounced (20 January 1979) and not one month of obtaining leave from Wan Mohamed J (17 May 1982). Thus, notwithstanding compliance with s. 68(2), the appellants have failed to comply with r. 56(a) as to the time limit for appeal. The notice of appeal filed on 28 May 1982 was clearly filed well out of time and we are therefore of the view that it is necessary for the appellants to proceed with the motion for leave of the full Court to extend time before the appeal can be heard.

We now turn to the next question as to whether we should allow appellant's motion for leave to extend the time for filing the notice of appeal on the assumption that the motion had not been abandoned. In the affidavit in support of the notice of motion by Mr. John Kah, an advocate and solicitor having the personal conduct of the appellants' case sworn on 22 June 1982 it is affirmed under paragraph 3 that:

> The advocates for the appellants relying on the state of the law as it then existed namely the decision of *T.O. Thomas v. K.C.I. Reddy* [1974] 2 MLJ page 87 and *Sri Jaya Transport Co. Ltd v. Fernandez Co. Ltd*, [1970] 1 MLJ page 87 did not apply for further arguments within the meaning of O. 54 r. 22A of the Rules of the Supreme Court 1957. However, on taking further advice advocates for the appellants were then advised to seek leave of the High Court pursuant to the provisions of s. 68(2) of the Courts of Judicature Act 1964.

In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal. For this legal proposition we have considered the decisions of this Court in *Sri Jaya*

Transport Co. Ltd. v. Fernandez [1970] 1 MLJ 87; *Gan Hay Chong v. Siow Kian Yuh & Anor*. [1975] 2 MLJ 129 and *Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn. Bhd.* [1979] 2 MLJ 236. The notice was filed more than three years out of time. As there are no special grounds shown for this Court to exercise its discretion under r. 56 (a), we find this is not a proper case in which we should allow for extension of time.

As this appeal is not properly brought before this Court, we have no alternative but to dismiss it with costs. As a consequential order, the appellants' notice of motion to amend the record of appeal dated 30 September 1982 is also dismissed.

Also found at [1984] 1 CLJ 154